84907-2

Court of Appeals Cause No. 63494-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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James K. Barnhart, Respondent

v.

City of Bothell, Petitioner



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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

The City of Bothell seeks review of the decision designated in part II. The City was respondent in the Court of Appeals.

## II. COURT OF APPEALS DECISION

In an opinion filed June 28, 2010, the Court of Appeals reversed the Superior Court's affirmation of Barnhart's conviction for stalking. The opinion is published, but a citation is not yet available. A copy of the opinion is attached herewith as Appendix A.

## III. ISSUES PRESENTED FOR REVIEW

(1) Barnhart accepted the jury panel without using any of the three peremptory challenges available to him to correct what he believed to be an error. Does Barnhart waive his right on appeal to claim error in this regard?

(2) Did the Court of Appeals err by not addressing the peremptory challenge issue?

(3) Barnhart's jury was comprised of Bothell residents and one non-resident who resides in unincorporated Snohomish County, but whose ZIP code substantially, though imprecisely, follows the boundaries of Bothell. Did Barnhart receive a fair trial when the jury selection process resulted in an impartial panel of jurors who were drawn from the community in which the crime occurred?

(4) Barnhart's jury consisted of two panelists from King County. Because these panelists are residents of Bothell and Barnhart never argues that he did not receive a fair trial, is this error, if it is an error, harmless?

## IV. STATEMENT OF THE CASE

Barnhart was tried by a jury in the City of Bothell Municipal Court for the offense of stalking. Bothell is one of a few cities in the state that is located in two counties, encompassing portions of both King and Snohomish Counties. The city alleged that Barnhart committed the offense of stalking in Snohomish County. See Court of Appeals Decision (App), attached herewith as Appendix A, Page 2.

Prior to the commencement of trial, Barnhart objected to the impaneling of any King County resident on the jury, based on article I, section 22 of the Washington Constitution. Id. Over Barnhart's for-cause objection, the trial court seated two King County residents and four Snohomish County residents on the jury. Id. The trial court then asked if Barnhart wished to use any of his three peremptory challenges. See Court of Appeals Brief of Respondent, Appendix 1, attached herewith as Appendix B. Despite having all three challenges available with only two King County residents seated, Barnhart chose to allow the King County jurors to remain seated. Id. Barnhart was convicted as charged. App at 2.

Barnhart appealed from his conviction to the King County Superior Court, assigning error to, among other things, the impaneling of King County residents on the jury. Id. The superior court affirmed. Id. In finding that no error had occurred, the court noted that RCW 2.36.050, the statute which permits courts of limited jurisdiction to randomly select jurors from the population of the area served by the court, was clearly not violated because Bothell includes portions of both King County and Snohomish County. See King County Superior Court Decision on RALJ attached to Court of Appeals Motion for Discretionary Review, attached herewith as Appendix C. Further, the superior court found that RCW 2.36.050 implements the constitutional provision, and, most importantly, that Barnhart did not allege that he was prejudiced by the selection procedure here. Id.

Barnhart subsequently sought discretionary review. App at 2. A commissioner of the Court of Appeals granted discretionary review, attached herewith as Appendix D, of the following issue: whether a jury may include members who reside other than in the county in which the offense is alleged to have occurred. The Court of Appeals then failed to consider argument germane to this topic and ultimately reversed and remanded for a new trial.

## V. ARGUMENT

### A. THIS COURT SHOULD DECIDE WHETHER A DEFENDANT CAN CHALLENGE A JUROR'S INCLUSION ON A JURY PANEL ON APPEAL WHEN HE FAILS TO EXERCISE ANY OF HIS PEREMPTORY CHALLENGES.

This case provides the court with a chance to clarify whether a party may challenge a jury panel on appeal when it fails to use a peremptory challenge to excuse a juror whom it believes should have been excused for cause. This issue should be reviewed for several reasons. First, this is an issue of substantial public interest as this ruling will affect all jury selections, both criminal and civil, and because this case will help define the importance of judicial efficiency in Washington.

Second, there is a conflict of law, which should be resolved. This Court has never abrogated its holding, which originated in State v. Jahns, 61 Wash. 636, 638, 112 P. 747 (1911), that defendants must use all of their peremptory challenges before they can show prejudice arising from the selection and retention of a particular juror to try the cause. Absent the use of all peremptory challenges, a defendant is barred from any claim of error in this regard. State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969), State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957), State v. Tharp, 256 Wn.2d 494, 500, 256 P.2d 482 (1953)

In their decision in this case, the Courts of Appeals cites to this Court's ruling in State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001), in which this Court, referring to the United States Supreme Court's opinion in United States v. Martinez Salazar, 528 U.S. 304, 315, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), stated as dicta that a defendant can allow a juror who should have been removed for cause to remain on the jury and then win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge, without being required to use a peremptory challenge to remove the juror. This conflict is still present in Washington case law and should be resolved. See e.g. Martini v. State, 121 Wn. App. 150, 163 & 175, 89 P.3d 250 (2004).

The United States Supreme Court has held that because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. Ross v. Oklahoma, 487 U.S. 81, 89, 108 S.Ct. 2273 (1988).

In Washington, RCW 4.44.130 states that each party in an action shall be entitled to three peremptory challenges. Pursuant to RCW 10.46.070, criminal matters shall be conducted in the same manner as in civil actions. Under Washington law, a party accepting a juror without exercising available challenges cannot challenge that juror's inclusion.

Martini ex rel. Dussault v. State, 121 Wn.App 150, 175, 89 P.3d 250 (2004). Further, a defendant must use all of his peremptory challenges before he can show prejudice arising from the selection and retention of a particular juror to try the cause, and is barred from any claim of error in this regard. State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969), State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957), State v. Tharp, 256 Wn.2d 494, 500, 256 P.2d 482 (1953), State v. Jahns, 61 Wash 636, 638, 112 P. 747 (1911).

In this case, Barnhart made a for-cause challenge to remove the two seated King County jurors. When the challenge was denied, Barnhart was given an opportunity to use his peremptory challenges. He declined to use any of the three challenges available to him to attempt to remove the two King County jurors. As such, Barnhart accepted a jury including members who reside other than in the county in which the offense is alleged to have occurred and, pursuant to the case law above, is barred from now arguing any error arising from that decision.

Barnhart will likely argue that State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001); State v. David, 118 Wn. App. 61, 74 P.3d 686 (2003); and State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002) have overturned State v. Jahns and the cases which came after it. However, upon a closer read, it is clear that even though this line of cases is similar,

the issues are distinct. Further, it seems highly unlikely that this Court would abrogate a prior ruling with a mere two sentences, no analysis for its decision, and as part of a case in which this issue was not properly before this Court because this Court has "previously disapproved of overruling binding precedent sub silentio." Broom v. Morgan Stanley DW, Inc., 2010 WL 2853917, --- P.3d ----, (2010). (Citing State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999)). Further, this court has held that "'[t]he doctrine of stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned."'" State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting Riehl, 152 Wn.2d at 147 (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))). Id. at 7.

While the issue in the instant case is whether a defendant must use his peremptory challenges to correct an erroneously denied for-cause challenge, in State v. Fire, the issue before the Washington State Supreme Court was whether a defendant who actually used a peremptory challenge to correct an erroneously denied for-cause challenge is deprived of his right to an impartial jury, even absent any showing that a biased juror sat on the panel, for which automatic reversal is the remedy. 145 Wn.2d at 152. Under the old Parnell rule, "a refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, was

considered on appeal as prejudicial." State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1970).

In Fire, this Court concluded that a defendant's use of a peremptory challenge to correct a trial court's error does not warrant automatic reversal, absent a showing of prejudice. 145 Wn.2d at 152. In making that determination, this Court abrogated its prior ruling in Parnell by stating, "the rule in [State v.] Stenz [30 Wash. 134, 70 P. 241 (1902)] enunciated in Parnell is no longer viable in Washington law." Fire, 145 Wn.2d at 163. Further, this Court stated, "we expressly abandon the Parnell rule and adopt that enunciated by the United States Supreme Court in [United States v.] Martinez-Salazar [528 U.S. 304, 120 S.Ct. 774 (2000)]." Id. at 165.

Martinez-Salazar is a case with facts similar to Fire in that the defendant actually used a peremptory challenge, albeit in a federal setting, to remove a juror to correct what the defendant believed to be an erroneous denial of a for-cause challenge. 528 U.S. at 304. Again, in the instant case, the defendant did not use any of his three challenges available to correct what he thought was an improper denial of a for-cause challenge.

The issue in Martinez-Salazar, which is the same issue addressed in Fire but not in the instant case, was whether or not the "forced" use of a

peremptory challenge in jury selection to correct a trial court's erroneous denial of a for-cause challenge violated a person's entitlement to use peremptory strikes and right to an impartial jury. 528 U.S. at 307. The rule that this Court adopted from Martinez-Salazar in Fire was that the use of a peremptory challenge to cure a trial court's error does not require reversal of the conviction absent prejudice, nor does such use deprive the right to an impartial jury. 145 Wn.2d at 154.

However, the United States Supreme Court in Martinez-Salazar stated that it was specifically addressing "a problem in federal jury selection left open in Ross" [v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273 (1988)]. 528 U.S. at 307. (Emphasis added.) The Court states that the Ross decision "dealt with an issue resembling the one presented here, although the issue in Ross arose in a state law setting." 528 U.S. at 313. (Emphasis added.)

This language indicates that the Court's decision in Ross, which, depending on the state, may require a defendant in a state law setting to use a peremptory challenge to strike a juror who should have been removed for cause in order to preserve the claim on appeal, was not being abrogated, simply clarified for a federal setting.

The Court in Martinez-Salazar then rejected the Government's contention that federal law should follow state law, like the Oklahoma statute considered in Ross. 528 U.S at 305.

Instead, the United States Supreme Court noted, as dicta, that the defendant in a federal court "had the option of letting [the biased juror] sit on the petit jury and, upon conviction, pursue a Sixth Amendment challenge upon appeal." Id. at 315.

In summary, the United States Supreme Court in Martinez-Salazar and Ross has ruled that in a federal setting, a defendant does not have to use a peremptory challenge to correct the trial court's error in order to preserve an appeal. However, in a state setting, if the state requires a defendant to use peremptory challenges to correct a trial court's error, a defendant must use said challenges or forego the issue on appeal.

In the instant case, this Court has consistently held since 1911 in State v. Jahns, supra, that a defendant must use his peremptory challenges to correct a trial court's erroneous denial of a for-cause challenge. Further, this Court has never abrogated that ruling, and this issue was not properly before the Court in State v. Fire, supra. Moreover, a review of relevant case law indicates all of the cases cited for this issue are still valid. Finally, the dicta in State v. Fire citing to the dicta in Martinez-

Salazar was not on point, as Martinez-Salazar is both factually different from the instant case and was deciding a federal, not state, issue.

Accordingly, the holding in Ross v. Oklahoma, supra, which allows a state to control the use of peremptory challenges, is controlling on this point. Because valid Washington case law states that a defendant must use his peremptory challenges in order to preserve the issue for appeal, a party waives its right to appeal if it fails to use its peremptory challenges.

Clarifying and affirming this nearly one-hundred-year rule first articulated in State v. Jahns supports judicial efficiency. To hold otherwise would allow parties a "dry run" in the lower courts and then seek review and reversal if the outcome is dissatisfying. Such a practice would results in unnecessary court congestion and a delay of justice.

**B. THIS COURT SHOULD DETERMINE WHETHER OR NOT THE COURT OF APPEALS ERRED IN REFUSING TO CONSIDER THE ROLE OF PEREMPTORY CHALLENGES IN THIS MATTER.**

The Court of Appeals states in its opinion that it accepted review on a single, narrow issue. The City disagrees based on the plain language of the Court of Appeals Commissioner's ruling on discretionary review. According to the commissioner's ruling, the issue here is "whether a jury may include members who reside other than in the county in which the

offense is alleged to have occurred." This issue is quite broad, and the role of peremptory challenges is absolutely germane to an analysis of the issue for which review was granted. The role of peremptory challenges as it relates to this issue should have been analyzed by the Court of Appeals.

As further justification for declining to address an issue properly before the Court of Appeals, the court stated that the issue was not fully briefed. However, the City fully briefed the issue in its response brief, and Barnhart was afforded an opportunity to address the issue in his reply. Barnhart's decision not to brief adequately the issue to the satisfaction of the Court of Appeals should not be counted in his favor and serve as grounds for the court not to address the issue.

Finally, in its opinion, the Court of Appeals states that "the city does not explain why that principle articulated in Fire does not apply to Barnhart." However, the city used five and a half pages of its brief to explain why Fire does not apply here in that it is factually distinct from Fire because Barnhart did not use a peremptory challenge to excuse a juror. Because the issue was briefed and properly before the court, it should have been addressed.

**C. THIS COURT SHOULD DECIDE WHETHER A JURY MAY INCLUDE MEMBERS WHO RESIDE OTHER THAN IN THE COUNTY IN WHICH THE OFFENSE OCCURRED WHEN SEATING SAID JURORS COMPLIES WITH RCW 2.36.050, WHICH FOLLOWS THIS COURT'S INTERPRETATION OF THE WASHINGTON STATE CONSTITUTION.**

The Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right...to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." CONST. art. I, § 22. "This follows the common law principle that juries should be drawn from the area of the alleged crime." Lanciloti, 165 Wn.2d at 667. (Emphasis added.) "Historically, jurors were not just drawn from the area; they might also be witnesses to the crime or character of the accused." Id. at 667. "Over time, the ideal jury evolved into a panel of impartial community members drawn from the community at large." Id. (Emphasis added.) "The constitutional requirement that the jury be both impartial and 'of the county' balances those two principles." Id. at 668. This language indicates that this Court has interpreted "of the county" to mean from the community/area in which the crime occurred.

RCW 2.36.050, which states in relevant part, that "jurors for the jury panel may be selected at random from the population of the area served by the court," (Emphasis added.) follows this Court's interpretation

of the Washington Constitution that the jury should be drawn from the area in which the crime occurred and made up of community members from the community at large.

While the framers of the Washington Constitution may not have foreseen a city which rests in two counties, as none of the six cities in Washington which rest in two counties existed at the time the Washington Constitution was ratified, this Court's interpretation of article one, section 22, indicates that the framers' intent was to create a jury from members of the community at large of the area in which the alleged crime occurred.

RCW 2.36.050, as applied, allowing for a municipal court to draw jurors by random selection from the area served by the court, results in a jury made up of members of the community in which the crime allegedly occurred. Therefore, the application of RCW 2.36.050 does not violate the supreme court's interpreted meaning of article 1, section 22.

In the case at bar, as in Tukwila v. Garrett, 165 Wn.2d 152, 96 P.3d 681 (2008), the City of Bothell developed its jury list by drawing jurors from areas encompassed by the zip codes that closely but imprecisely followed the city's boundaries. The one difference is that the area and community of Bothell rests in two counties and draws jurors from both King and Snohomish counties. However, the juror pool drawn and summoned is representative of the community and area of Bothell. In this

case, the result was a jury consisting of five residents of the City of Bothell and one resident of unincorporated Snohomish County.

This exactly follows this Court's interpretation that juries should be drawn from the area of the alleged crime and that a jury should be a panel of impartial community members drawn from the community at large.

As a result, Barnhart's jury, which included members who reside other than in the county in which the offense occurred, was proper because it both complied with RCW 2.36.050 and followed this Court's interpretation of the Washington State Constitution.

## D. THIS COURT SHOULD DETERMINE WHETHER A JURY MAY INCLUDE MEMBERS WHO RESIDE OTHER THAN IN THE COUNTY IN WHICH THE OFFENSE OCCURRED WHEN THE RESULT IS A HARMLESS ERROR.

The United States Supreme Court has recognized that most constitutional errors can be harmless. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827 (1999). "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." Neder, 527 U.S. at 8, citing Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101 (1986). In order for an error to be held harmless, the

reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. State v. King, 167 Wn.2d 324, 219 P.3d 642, citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

However, there are a limited class of cases in which "structural" errors have occurred, which are subject to automatic reversal. Neder, 527 U.S. at 8. Such cases include complete denial of counsel, a biased trial judge, racial discrimination in selection of a grand jury, denial of self-representation at trial, and defective reasonable-doubt instruction. Id. (Other citations omitted.) "Such errors deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Id. at 8-9.

This Court has held that a structural error results in presumed prejudice, the remedy for which is remand for a new trial. State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).

In the case at bar, the City of Bothell argues that there is no error in seating two jurors from King County because Barnhart accepted the jury with the King County jurors and because the Court complied with RCW 2.36.050, which reflects the spirit and this Court's interpretation of the Washington State Constitution. However, if this Court does find that an error occurred, that error is harmless beyond a reasonable doubt.

Here, Barnhart had counsel and was tried by an impartial adjudicator. Therefore, there is a strong presumption that any constitutional errors that may have occurred are subject to a harmless error analysis. While there does not appear to be any cases with analogous facts to the case at bar, there are many cases detailing the importance of a defendant receiving a fair trial.

This Court had held that the purpose of statutory procedures for making up the jury lists [referring to RCW 2.36.050] is to provide a fair and impartial jury. Tukwila, 165 Wn.2d at 159, 196 P.3d 681 (2008). (citing State v. Twyman, 143 Wn.2d 115, 122, 17 P.3d 1184 (2001)). Further, if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity that has had no effect upon the purpose to be effected. Tukwila, 165 Wn.2d at 160 (citing State v. Rholeder, 82 Wash 618, 620-21, 144 P. 914 (1914)). (Emphasis added.)

Prejudice [in the jury selection process] will be presumed only if there is a *material* departure from the statutory requirements. (Emphasis NOT added.). Tukwila, at 161. If there is substantial compliance with the statute, then a challenger may claim error only if he or she establishes actual prejudice. Id. In establishing actual prejudice, the most important questions are whether "there was any exclusion of any class of citizen of

weighting or the jury list or that the jury list was not a representative cross section of the community," or whether "the jury list, the venire or the jury itself was so composed that there might have been any inherent bias or prejudice" against the challenger or denial of his or her right to challenge any juror for bias or peremptorily. Id. (Emphasis added.)

In the instant case, Barnhart argues that because his alleged criminal acts took place in Snohomish County, the court erred by seating jurors who were King County residents. Even assuming, without conceding, that an error occurred, Barnhart makes no argument regarding prejudice: presumed or actual.

Addressing the possibility of presumed prejudice, it is clear that there is none. In Tukwila, the Court held that the selection of jurors from outside Tukwila's boundaries does not invalidate the selection procedure provided the jurors were randomly selected. Id. at 162. Here, the trial court, as required, randomly selected the jurors for Barnhart's trial. Barnhart makes no other argument that there was presumed prejudice. Absent a material departure, which has not been argued, there cannot be presumed prejudice.

Further, even with the King County residents seated, the jury still consisted of a two-thirds majority of Snohomish County residents. Thus,

any error could not be considered material departure; therefore, no presumed prejudice exists.

Without presumed prejudice, Barnhart can only claim error if he proves actual prejudice. Barnhart also fails to make any such argument regarding the exclusion of any class of citizen, that the jury list was not a representative cross section of the community, that the composition of the jury or jury list showed inherent bias or prejudice, or that there was denial of his right to challenge any juror for bias or peremptorily.

Here, Barnhart had a fair and impartial jury, which is, ultimately, the critical inquiry. Tukwila, at 162-63. Returning to the question of whether any alleged constitutional error was harmless, because the record is completely devoid of any prejudice, this Court can find that even if there was an error, it is harmless beyond a reasonable doubt. There is no record or argument of any prejudice; therefore, there is nothing that would lead this Court to believe the jury selection process contributed to Barnhart's conviction.

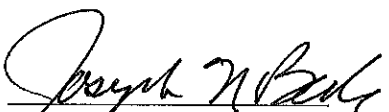
In the alternative, this Court can decline to find whether an error even occurred because Barnhart has failed to prove, or even claim, that prejudice exists as a result of the jury selection process. Without prejudice, the question of error is moot.

## V. CONCLUSION

The City of Bothell respectfully requests that this court grant review and reverse the Court of Appeals. Defendants must exhaust their peremptory challenges in order to preserve their right to appeal the seating of an impaneled juror. Further, drawing jurors from the community in which the crime occurred should be found to be a constitutional practice.

Dated this 27th day of July, 2010

Respectfully submitted,



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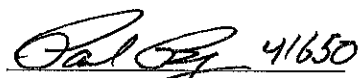

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# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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|---|---|---|
| CITY OF BOTHELL, | ) | DIVISION ONE |
| | ) | |
| Respondent, | ) | No. 63494-1-I |
| | ) | |
| v. | ) | |
| | ) | |
| | ) | |
| JAMES K. BARNHART, | ) | PUBLISHED OPINION |
| | ) | |
| Petitioner. | ) | FILED: June 28, 2010 |
| | ) | |

DWYER, C.J. — Today, we decide whether a jury in a criminal trial may include members who do not reside in the county in which the charged offense is alleged to have been committed. Pursuant to article I, section 22 of the Washington Constitution, a defendant has the right to be tried by a "jury of the county in which the offense is charged to have been committed." Thus, to be constitutionally qualified for jury service, a prospective juror must reside in the county wherein the offense is alleged to have been committed. The City of Bothell, which is located in both King County and Snohomish County, charged that James K. Barnhart committed the offense of stalking in Snohomish County. However, the jury that convicted Barnhart included King County residents, in violation of Barnhart's jury-trial right provided in article I, section 22. Accordingly, we reverse and remand for a new trial.

I

Barnhart was a tried by a jury in the City of Bothell Municipal Court for the offense of stalking. Bothell is one of a few cities in the state that is located in two counties, encompassing portions of both King and Snohomish Counties. The city alleged that Barnhart committed the offense of stalking in Snohomish County.

Prior to the commencement of trial, Barnhart objected to the impaneling of any King County resident on the jury, invoking his right to a trial "by an impartial jury of the county in which the offense is charged to have been committed" as provided in article I, section 22 of the Washington Constitution. Over Barnhart's objection, the trial court seated two King County residents and four Snohomish County residents on the jury. Barnhart was convicted as charged.

Barnhart appealed from his conviction to the King County Superior Court, assigning error to, among other things, the impaneling of King County residents on the jury. The superior court affirmed. Although the superior court recognized Barnhart's article I, section 22 jury-trial right and that the city had alleged that the charged offense was committed in Snohomish County, it concluded that the trial court did not err because it had complied with RCW 2.36.050.[1] That statute permits courts of limited jurisdiction to randomly select jurors "from the population of the area served by the court," which, in this case, includes portions of both

[1] The statute provides:
In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court.

King County and Snohomish County.

Barnhart subsequently sought discretionary review. A commissioner of this court granted discretionary review of the following issue: "whether a jury may include members who reside other than in the county in which the offense is alleged to have occurred."

II

Barnhart contends that the impaneling of King County residents on the jury violated his state constitutional right to be tried by a jury of the county in which the charged offense was alleged to have been committed. We agree.

Article I, section 22 of the Washington Constitution sets forth the rights of the accused. It provides that criminal defendants shall have the right to "trial by an impartial jury of the county in which the offense is charged to have been committed." CONST. art. 1, § 22. At issue is whether a jury that includes members who do not reside in the county in which the offense is alleged to have been committed is consistent with a defendant's jury-trial right provided in article I, section 22. This issue appears to be one of first impression.

When interpreting provisions of the state constitution, we "look first to the plain language of the text and . . . accord it its reasonable interpretation." Wash. Water Jet Workers Ass'n v. Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) (citing Anderson v. Chapman, 86 Wn.2d 189, 191, 543 P.2d 229 (1975)). "The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted." Yarbrough, 151 Wn.2d at 477 (citing State ex rel. O'Connell v. Slavin, 75 Wn.2d 554, 557, 452 P.2d 943 (1969)). "'[I]f

a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible.'" City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 650, 211 P.3d 406 (2009) (alteration in original) (quoting Anderson, 86 Wn.2d at 191).

The plain language of article I, section 22 confers on a defendant the right to be tried by a "jury of the county in which the offense is charged to have been committed." The term "county" is singular; it is also definite. It plainly refers to only one, particular county: the county wherein the defendant was alleged to have committed the charged crime. On its face, article I, section 22 does not permit a jury to include any individual who is not a resident of that county. Leading authorities on the state constitutional convention do not suggest that delegates to the convention understood article I, section 22 to have a different meaning. See ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 35–37 (2002); THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 510–12 (Beverly Paulik Rosenow ed., William S. Hein & Co. 1999) (1962). Thus, residence in the county wherein the charged crime was allegedly committed is a constitutional requirement that must be satisfied for an individual to qualify for jury service. A defendant's jury-trial right provided in article I, section 22 is satisfied only if all jurors reside in the county wherein the charged offense was allegedly committed.

The city does not affirmatively argue that the drafters of the state constitution understood article I, section 22 to allow for a jury to be composed of individuals who do not reside in the county wherein the charged crime was

alleged to have been committed. Instead, the city argues that the drafters likely did not contemplate municipalities such as Bothell that straddle county lines. Be that as it may, article I, section 22 has not been amended. To read article I, section 22 as the city urges would require us to ignore the plain meaning of the text. This we may not do. Wash. State Motorcycle Dealers Ass'n v. State, 111 Wn.2d 667, 674, 763 P.2d 442 (1988).

In addition, the city mistakenly relies on State v. Lanciloti, 165 Wn.2d 661, 201 P.3d 323 (2009), and City of Tukwila v. Garrett, 165 Wn.2d 152, 196 P.3d 681 (2008), in defense of the jury selection procedure used herein. In Lanciloti, our Supreme Court upheld the constitutionality of RCW 2.36.055, which allows certain superior courts to select jurors from only a subsection of the county wherein the court is located, as opposed to the entire county. 165 Wn.2d at 667–72. Lanciloti addressed a unique statutory regime that does not apply in this context. At issue in Garrett was whether RCW 2.36.050, which allows a court of limited jurisdiction to select jurors from the population of the area served by the court, permitted a municipal court to seat jurors who did not actually live in the city served by the court. 165 Wn.2d at 162. Our Supreme Court held that the court's practice of summoning the venire from an area that imprecisely followed the boundaries of the city substantially complied with the statute, even where some jurors actually resided outside of the city. Garrett, 165 Wn.2d at 162. However, the trial courts in neither Lanciloti nor Garrett seated jurors who did not reside in the county wherein the charged crime was alleged to have been committed. Therefore, neither of those decisions applies in this context.

Moreover, RCW 2.36.050 cannot relax the protection afforded to a criminal defendant by article I, section 22. Passage of a statute is not among the procedures for amending the state constitution. See CONST. art. 23. Although the legislative policy of allowing a court of limited jurisdiction to draw a jury from only the portion of the county served by the court is consistent with article 1, section 22, State v. Twyman, 143 Wn.2d 115, 124–25, 17 P.3d 1184 (2001), article I, section 22 guarantees the right of an accused to be tried by a jury drawn exclusively from the county wherein the charged crime was alleged to have been committed. Lanciloti, Garrett, and Twyman are consistent with that principle.

The impaneling of the jury herein over Barnhart's objection constitutes a manifest violation of Barnhart's jury-trial right as provided in article I, section 22 of the state constitution. He properly challenged for cause the prospective King County jurors. The trial court erred by denying these challenges.

A material departure from the statutory scheme for selecting a jury results in presumptive prejudice requiring reversal and remand for a new trial. State v. Tingdale, 117 Wn.2d 595, 602–03, 817 P.2d 850 (1991). Similar deviation from a constitutional requirement can be no less consequential. Accordingly, reversal and remand for a new trial is required.[2]

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[2] The city contends that we should affirm despite the commission of constitutional error because Barnhart failed to exercise peremptory challenges and failed to show anything other than harmless error. However, discretionary review of those issues was neither sought nor granted, and the city did not seek to modify the order granting discretionary review. In addition, the city acknowledged at oral argument that it had not raised these contentions in the courts below.

Pursuant to RAP 2.3(e), "[u]pon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted." That is, we may "determine[ ] the scope of discretionary review." Emily Lane Homeowners Ass'n v. Colonial Dev., L.L.C., 139 Wn.

Reversed and remanded.

Dwyer, C.J.

We concur:

Spearman, J.  Becker, J.

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App. 315, 318, 160 P.3d 1073 (2007), aff'd in part, rev'd in part sub nom., Chadwick Farms Owners Ass'n v. FHC, LLC, 166 Wn.2d 178, 207 P.3d 1251 (2009). We granted review on a single, narrow issue. Accordingly, we decline to address other issues for which discretionary review was not granted.

Further, it would it be imprudent for us to address those complex issues for the first time on discretionary review without the benefit of full development of the issues and complete briefing. The city argues that several Washington decisions stand for the broad proposition that a defendant must exercise his or her peremptory challenges before assigning error to the seating of a particular juror. See, e.g., State v. Robinson, 75 Wn.2d 230, 231–32, 450 P.2d 180 (1969); State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957); State v. Tharp, 42 Wn.2d 494, 500, 256 P.2d 482 (1953); State v. Jahns, 61 Wash. 636, 638, 112 P. 747 (1911); Martini v. State, 121 Wn. App. 150, 175, 89 P.3d 250 (2004) (Quinn-Brintnall, J., concurring); State v. Reid, 40 Wn. App. 319, 322, 698 P.2d 588 (1985). However, unlike the factual situations presented in those cases, in this case Barnhart actually objected to the seating of individuals on the basis that they were not constitutionally qualified to serve as jurors. The city's contention is also in tension with our Supreme Court's statement that

> [i]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

State v. Fire, 145 Wn.2d 152, 158, 34 P.3d 1218 (2001) (adopting reasoning articulated in United States v. Martinez-Salazar, 528 U.S. 304, 315, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)). The city does not explain why that principle articulated in Fire does not apply to Barnhart. Furthermore, unlike the issue decided in Fire, Barnhart does not contend that he suffered prejudice as a result of exercising a peremptory challenge to excuse a juror who should have been excused for cause.

We also note that the city's argument concerning prejudice and harmless error is based on the premise that Barnhart bears the burden of showing prejudice. The city acknowledges that prejudice will be presumed when there is a material departure from statutory requirements for jury selection but argues that no such presumption is warranted because the trial court herein substantially complied with RCW 2.36.050. However, as is explained above, RCW 2.36.050 cannot relax the protection afforded under the state constitution, which was ignored in this case. The city does not explain why the presumption does not arise in Barnhart's favor.

# APPENDIX B

11/13/09 08:47:09

DD1000MI Case Docket Inquiry (CDK) BOTHELL MUNICIPAL PUB

Case: 15995 BOP CN Csh: Pty: DEF 1 StID:

Name: BARNHART, JAMES KEVIN NmCd: IN 763 15360

Name: BARNHART, JAMES KEVIN Cln Sts:
STALKING

Note:

Case: 15995 BOP CN Criminal Non-Traffic On appeal N

| | | | |
|---|---|---|---|
| 11 07 2007 | 1043 - CITY NO CHALLENGE FOR CAUSE | | DMS |
| | 1043 - ATD MOVES TO CHALLENGE FOR CAUSE JURORS WHO ARE KING COUNTY RESIDENTS | | DMS |
| | 1044 - CR/ DENIED. ATD OBJECTION IS NOTED | | DMS |
| | 1044 - CITY PEREMPTOPRY JUROR #11 SEAT 5 | | DMS |
| | 1045 - CLERK CALLS JUROR #13 SEAT 5 | | DMS |
| | 1045 - DEFENSE ACCEPTS THE PANEL AS SEATED | | DMS |
| | 1045 - CITY ACCEPTS THE PANEL AS SEATED | | DMS |
| | 1046 - JURORS SWORN AND SEATED AS FOLLOWS; | | DMS |
| | #17 DAVID NEAL | #2 KATHLEEN BILLINGTON | DMS |
| | #23 JILL OCAIN | #13 ELAINE MADISON | DMS |
| | #7 KATHLEEN FICHERA | #1 DEBORAH ABBOTT | DMS |
| | 1047 - JURORS EXCUSED RECESS | | DMS |
| | 1105 - JURORS IN | | DMS |

# Appendix 1

# APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

| | |
|---|---|
| CITY OF BOTHELL, Respondent. vs. JAMES K. BARNHART, Appellant. | NO. 08-1-07319-6 SEA<br>DECISION ON RALJ<br>CLERK'S ACTION REQUIRED |

This appeal came on regularly for oral argument on pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the Court rules as follows:

Reasoning Regarding Assignments of Error:

1. The City of Bothell trial court did not err when it seated two jurors who were King county residents. Bothell includes part of King County and part of Snohomish County. The incident giving rise to the charges in this case arose in Snohomish County.

Article I, section 22 of the Washington Constitution guarantees the right to trial by an "impartial jury of the county in which the offense is charged to have been committed ...." RCW 2.36.050 provides for selection of jurors "at random from the population of the area served by the court,..." The method for summoning jurors is a matter left to the legislature to define by the statute. State v. Twyman, 143 Wash.2d 115, 124, 17 P.3d 1184 (2001). Clearly RCW 2.36.050 was not violated in this case because jurors were drawn from both counties, which is "the area served by the court". Appellant argues that because the incident arose in Snohomish County, article I, section 22 of the



King County Superior Court
516 Third Avenue
Seattle, Washington 98104

Washington Constitution requires that the entire jury be drawn from Snohomish County. However, RCW 2.36.050 implements the constitutional provision, and the statutory requirements were met here. Furthermore, the constitutional provision does not state that all the jurors must be residents of the county where the charge arose. Here, all but 2 jurors were residents of Snohomish County, "the county in which the offense is charged". Nor does appellant allege he was prejudiced by the selection procedure here. There was no error.

2. The evidence was sufficient to support the conviction for stalking both alleged victims. Viewed in the light most favorable to the City, the evidence showed appellant followed Mr. Heseness on three separate occasions, and followed Ms. Barrett on two separate occasions.

3. It was not error to include in the "to convict" instruction the alternative means of repeated harassment without providing the statutory definition of harassment, which defines the term as a course of conduct, meaning a pattern of conduct composed of a series of acts over a period of time. RCW 10.14.020. The evidence was sufficient to satisfy this alternative means under the statutory definition. Appellant has not shown he was prejudiced by the court not giving the statutory definition of harassment..

**IT IS HEREBY ORDERED that the above cause is:**

**[ X ] AFFIRMED [ ] REVERSED [ ] MODIFIED**

**REMANDED** to: Court for further proceedings, in accordance with the above decision.

DATED: 4/20/09

Judge Theresa B. Doyle
King County Superior Court



King County Superior Court
516 Third Avenue
Seattle, Washington 98104

# APPENDIX D

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

| | | |
|---|---|---|
| CITY OF BOTHELL,<br><br>Respondent,<br><br>v.<br><br>JAMES K. BARNHART,<br><br>Petitioner. | ) | No. 63494-1-I<br><br>COMMISSIONER'S RULING GRANTING DISCRETIONARY REVIEW |

James Barnhart seeks discretionary review of a superior court decision affirming his conviction in Bothell Municipal Court of stalking. Barnhart contends his jury did not meet Constitutional standards because it was not drawn exclusively from the County in which the offense was alleged to have been committed. Review is granted.

Barnhart was charged with Harassment, alleged to have been committed in Snohomish County. The charge was later amended to Stalking. The case proceeded to a jury trial on November 7, 2007.

The City of Bothell sits partly in Snohomish County and partly in King County. RCW 2.36.050 permits a jury to be drawn from the area served by the Court. Consistent with the statute, a jury impaneled in Bothell Municipal Court might include jurors living in either King or Snohomish Counties. In Barnhart's case, the jury consisted on 4 jurors residing in Snohomish County and 2 jurors residing in King County. Barnhart raised this issue prior to his trial.

This jury convicted Barnhart of Stalking. He appealed, arguing that the jury was improperly constituted. The King County Superior Court affirmed, finding that the jury

was drawn consistent with the statute and that how jurors are summoned is a matter left to the legislature to define by statute. Barnhart seeks discretionary review.

## CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted under RAP 2.3(d) only:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

## DECISION

Article 1, § 22 of the Washington Constitution grants each person accused of a crime the right to 'a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.' "[T]he words 'jury of the county,' as used in our Constitution, have never been held to mean more than that the jurors when summoned, should come from some part of the county." State v. Newcomb, 58 Wash. 414, 418, 109 P. 355 (1910).

Bothell relies on State v. Twyman, 143 Wn.2d 115, 17 P.3d 1184 (2001) and City of Tukwila v. Garrett, 165 Wn.2d 152, 196 P.3d 681 (2008). But Twyman and Garrett do not address the issue presented here, whether a jury may include members who reside other than in the county in which the offense is alleged to have occurred. There do not appear to be any cases directly resolving this issue. Under the circumstances,

this case presents a significant question of law under the Constitution of the State of Washington. Review is accordingly granted.

Now, therefore, it is hereby

ORDERED that Barnhart's motion for discretionary review is granted.

Done this 29th day of July, 2009.

Court Commissioner

# APPENDIX E

RCW 2.36.050
Juries in courts of limited jurisdiction.

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court.

[1988 c 188 § 3; 1980 c 162 § 6; 1972 ex.s. c 57 § 1; 1891 c 48 § 4; RRS § 92.]

Notes:

**Legislative findings -- Severability -- Effective date -- 1988 c 188:** See notes following RCW 2.36.010.

**Severability -- 1980 c 162:** See note following RCW 3.02.010.

Courts of limited jurisdiction: Chapter 3.02 RCW.

# APPENDIX F

RCW 4.44.130
Challenges — Kind and number.

Either party may challenge the jurors. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges. When there is more than one party on either side, the parties need not join in a challenge for cause; but, they shall join in a peremptory challenge before it can be made. If the court finds that there is a conflict of interests between parties on the same side, the court may allow each conflicting party up to three peremptory challenges.

[1969 ex.s. c 37 § 1; Code 1881 § 207; 1877 p 43 § 211; 1854 p 165 § 186; RRS § 324.]

# Appendix G

RCW 10.46.070
Conduct of trial — Generally.

The court shall decide all questions of law which shall arise in the course of the trial, and the trial shall be conducted in the same manner as in civil actions.

[1891 c 28 § 70; Code 1881 § 1088; 1873 p 237 § 249; 1854 p 119 § 111; RRS § 2158. FORMER PART OF SECTION: 1891 c 28 § 66, part; Code 1881 § 1078; 1873 p 236 § 239; 1854 p 118 § 101; RRS § 2137, part, now codified as RCW 10.49.020.]

Notes:

**Rules of court:** This section superseded, in part, by CrR 6. See comment preceding CrR 6.1.

# Appendix H

## ARTICLE I
## DECLARATION OF RIGHTS

**SECTION 22 RIGHTS OF THE ACCUSED.** In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [**AMENDMENT 10,** 1921 p 79 Section 1. Approved November, 1922.]

Court of Appeals Cause No. 63494-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

James K. Barnhart, Respondent

v.

City of Bothell, Petitioner

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DECLARATION OF SERVICE

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I, Paul Byrne, declare under penalty of perjury under the laws of the State of Washington that the enclosed copy of the City's Petition for Review to the Supreme Court in the above-referenced case was served on this date, July 27, 2010 on the following party:

Mark R. Stephens
2825 Colby Ave Ste 304
Everett, WA 98201-3553
United States

DATED this 27th day of July, 2010, at Bothell, Washington.

JOSEPH BECK
Bothell City Attorney

41650
Paul Byrne, WSBA # 41650
Associate City Attorney